Supreme Court, U.S.
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No. 02-751

IN THE

Supreme Court of the United States

SUN PRAIRIE, A PARTNERSHIP,

Petitioner,

v.

NEAL A. McCALEB, ASSISTANT SECRETARY – INDIAN AFFAIRS, GALE A. NORTON, SECRETARY OF THE INTERIOR, ROSEBUD SIOUX TRIBE, CONCERNED ROSEBUD AREA CITIZENS, SOUTH DAKOTA PEACE AND JUSTICE CENTER, PRAIRIE HILLS AUDUBON SOCIETY, and HUMANE FARMING ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF IN OPPOSITION OF CONCERNED ROSEBUD AREA CITIZENS, ET AL.

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RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondent non-profit organizations have no parent corporations and do not issue stock.

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STATEMENT OF THE CASE

The factory hog farm at issue in this case is partially constructed. Two of the planned 13 sites are now in commercial operation. If completed as planned, it will be one of the largest of its kind in the nation. Its hundreds of metallic buildings, sprawled over thousands of acres of the rolling grasslands of the Rosebud Sioux Reservation, will produce vast quantities of air, water, and solid waste pollution, including more than a million gallons of animal wastewater, and more than a ton of animal carcasses, each day.

Despite the project's tremendous environmental impacts, Sun Prairie was able to persuade regional Bureau of Indian Affairs ("BIA") officials to approve its lease with the Rosebud Sioux Tribe ("the Tribe") without preparing an environmental impact statement ("EIS") under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"). Local residents concerned with the associated health and environmental issues formed Respondent organization Concerned Rosebud Area Citizens in order to challenge the lease approval. In 1998, this group, joined by the other organizations identified in the caption (hereinafter collectively "Citizens"), filed suit in the U.S. District Court for the District of Columbia seeking preparation of an EIS under NEPA.

After receiving the Plaintiffs' complaint and motion for a preliminary injunction, the government determined that its position in the suit was legally untenable, since an

EIS was undeniably required by NEPA.[1] In consultation with Sun Prairie and the Tribe, BIA Director Gover decided to rescind the lease approval and begin preparation of an EIS. He expressed confidence that the project could go forward as soon as the environmental issues had been addressed.[2]

Opposed to the preparation of a complete environmental analysis of the project, Sun Prairie continued to invest heavily in the hog farm while it instituted a new suit against the government. It won a series of injunctive orders from the District Court for South Dakota, culminating in a permanent injunction against governmental interference with the project. Pet. App. B. After the government and Citizens filed appeals of this injunction, the Tribe reconsidered its relationship with Sun Prairie and the hog farm. Having experienced first hand the environmental impacts of the first phase of the project, the Tribe declared its opposition to its completion, and obtained leave from the Court of Appeals to realign with Appellants BIA and Citizens, leaving Sun Prairie as the sole Appellee.

The same week, Citizens filed a brief with the Court of Appeals challenging Sun Prairie's standing to sue. Citizens asserted that Sun Prairie could not demonstrate that it had an interest that would satisfy the "zone of

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1. *See* BIA's recission letter, Pet. App. E at 70a ("[the lease approval] is, and always has been, void for failure to fully comply with NEPA.").

2. *See* Pet. App. E at 70a ("I encourage you to resubmit a proposal ...").

interests" protected by any federal statute. Sun Prairie dismissed this contention as "another incredible assertion" by Citizens, arguing that its economic stake in the project enjoyed legal protection under at least four federal statutes. This ambitious claim of standing was rejected by the Eighth Circuit Court of Appeals in a unanimous opinion by Chief Judge Hansen, former Chief Judge Wollman, and Judge Bye. Pet. App. A.

The company submitted a petition for rehearing *en banc* in which it abandoned its formerly expansive standing claims in favor a much more limited and fact-specific approach. In the rehearing petition, Sun Prairie argued that it could establish its prudential standing because it had been specially aggrieved by the government's initial approval – followed by its disapproval – of the lease. The Eighth Circuit disagreed; the petition for rehearing *en banc* was denied. Pet. App. C. at 59a.[3/]

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3. At oral argument, the government agreed with Citizens that Sun Prairie did not satisfy the applicable standards for prudential standing.

REASONS FOR DENYING THE WRIT

1. This Case is of No National Importance Because the Legally Relevant Facts Are Extraordinary, Unprecedented and Highly Unlikely to Recur

Sun Prairie asserts, as it must, that the outcome of this case is important to the future of economic development in Indian Country, pointing particularly to a statute enacted after this case was filed. Pet. at 11-13. Nothing could be further from the truth. Indeed, it would be hard to imagine a case with a narrower focus or less important implications for those who would do business with tribes in the future.

On its face, the Petition raises only a single, factually circumscribed issue: whether one who has executed a lease with a Tribe and received the government's blessing has prudential standing to sue if the government's blessing is subsequently abrogated. The Petition does not raise any of the following, more important issues:

– whether future non-Indian contractors who find themselves in a similar position would have a cause of action against the government; that issue was raised below and not addressed by the Eight Circuit;

– whether non-Indians who execute agreements with Indian tribes in the future will have prudential standing to challenge a threshold disapproval of such agreements by BIA; Sun Prairie no longer challenges the rule barring standing in such cases;

– whether non-Indian contractors in a similar position would have legal recourse against the Indian tribe.

The facts in this case are unique, due to the circumstance of the 1998 lawsuit by Citizens that forced the government to rescind its approval of the lease. Sun Prairie has pointed to no past situations involving similar circumstances, nor has it predicted that similar situations will arise in the future. Such a prediction would be highly speculative at best, particularly since this case provides a lesson to others – *i.e.*, that resisting the preparation of a required environmental analysis will likely lead to protracted litigation.

Evidence that a similar alignment of circumstance is unlikely to recur can be found in the observation that similar facts have never occurred previously, judging from the case law. Here the pertinent law goes back more than 200 years. Federal approval of leases between non-Indians and Indian tribes has been statutorily mandated since President Washington signed the Act to regulate Trade and Intercourse with Indian Tribes and to preserve Peace on the Frontiers, §12, 1 Stat. 469, 472 (1796). Litigation against the government in connection with its lease approval powers dates back at least to the 19th century. *See, e.g.*, *In re Sanborn*, 148 U.S. 222, 227 (1893). While the Department of the Interior has approved and disapproved countless leases, legal disputes in this area have been extremely rare; research reveals approximately a dozen reported court decisions. In some cases, non-Indians pursuing contracts with tribes have

sued to compel BIA's approval thereof.[4] In others, litigants have attempted to overturn BIA's approval of contracts between a tribe and a third party.[5] No reported cases, however, present facts in any way similar to the facts of this case.

Sun Prairie's claim that this case has important implications for the future of Indian commerce is easily shown to be overstated. Businesses considering ventures on the reservation are concerned with real-world economic matters such as (1) availability of materials and access to markets, since many reservations are remotely situated, (2) the proximity and size of a trained labor force, and (3) questions of infrastructure, such as fire protection services. It is barely conceivable that these cost-benefit-risk calculations would be influenced by the availability of prudential standing to sue should their contracts be rejected by the government.[6] It is even less conceivable, moreover, that such calculations would consider the narrow question presented in this case -- whether prudential standing can be established should the

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4. *See, e.g., Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052 (10th Cir. 1993).

5. *See, e.g., Schmit v. International Finance Management Co.*, 980 F.2d 498 (8th Cir. 1992) (*per curiam*).

6. Non-Indian companies who negotiate legal arrangements with Indian tribes are well aware that the immunities enjoyed by both native sovereigns and the federal sovereign pose substantial legal risks. *See Gray v. Johnson*, 395 F.2d 533, 537 (10th Cir.), *cert. denied*, 392 U.S. 906 (1968) (government agencies interact with the public subject to limitations on their legal liability, "and one who deals with them assumes the risk that they are so acting.").

government first approve the agreement, and then reject it. In sum, the uniqueness of the facts in this case make it difficult to conceive of a case that would be less important to anyone not a party to it.

2. The Question Presented in the Petition Was Raised for the First Time in Sun Prairie's Petition for Rehearing *En Banc*

The law governing judicial review of federal rejection of Indian contracts is dominated by one over-arching rule: non-Indians may not sue to redress alleged wrongdoing by BIA because it was the Indians, not their trading partners, who were intended by Congress to benefit from the federal statutes requiring oversight. *See* Section 3, *infra*. The Petition acknowledges this dominant rule, but spins it by stating that in "some jurisdictions" a "would-be lessee" (*i.e.*, a party whose lease is disapproved on first review) lacks prudential standing to challenge the government's disapproval thereof. Pet. at 14.

The Petition goes on to assert, however, that the issue presented by the instant case is fundamentally different:

> "[o]nce the lease is approved, however, that status changes fundamentally. At that point the non-Indian party has become an actual lessee and is therefore actually regulated by the suite of statutes and regulations that control the lease."

Id. at 15. In other words, the issue that Sun Prairie has presented to this Court is a narrow subset of the larger question of the prudential standing of non-Indian

contractors generally. The Question Presented in the Petition reflects the same narrow focus:

> Once a lease of Indian lands to a non-Indian party has received federal approval under 25 U.S.C. §§ 81 and 415, does that non-Indian party have prudential standing to challenge a federal agency's attempt to void the lease by unilaterally withdrawing the previous federal approval.

Pet. at 1 (emphasis added).

Sun Prairie's argument for an exception to the over-arching rule denying standing to non-Indians suffers from a number of infirmities, including, as discussed below, that it conflicts with all the pertinent judicial authorities. For present purposes, however, its chief problem is that this issue was not presented to the Court of Appeals until rehearing *en banc* was sought. In its brief and at oral argument, Sun Prairie attacked the over-arching rule without addressing the exception to that rule that it seeks here. Sun Prairie's rejoinder to Citizens' challenge to its standing was simple, clear and brief: Citizens were just plain wrong. According to Sun Prairie, the case law barring standing to non-Indians was similarly wrong. In its brief Sun Prairie did not acknowledge the validity of the overarching rule, but challenged it head on.[7] Indeed, Sun Prairie claimed boldly that its interests in the factory hog farm fell "squarely" within the zones of interest protected by four independent statutory regimes, including

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7. Sun Prairie Br. at 15-18.

"25 U.S.C.," NEPA, the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* ("NHPA"), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA").

Obviously, Sun Prairie did not properly understand this issue. No serious argument can be made that Sun Prairie's economic interests in the hog farm enjoy congressional protection under the NHPA or the APA. What matters here, however, is that the argument was sketched in such bold, broad, and crude strokes that it never served to put the Court of Appeals, or the parties, on notice of the subsidiary standing issue this is the sole subject of the Petition. Sun Prairie never made any of the fine distinctions and elaborate policy arguments that support its current effort to establish a small island of standing in a sea of non-reviewability. It is therefore not surprising that the opinion of the Circuit Court did not reference Sun Prairie's new, nuanced distinction between governmental disapprovals of contracts and governmental recission of past approvals. This distinction, now described as "fundamental," was obscured to the point of invisibility before the Court of Appeals – until, that is, rehearing *en banc* was sought.

After the Court of Appeals' decision was handed down, Sun Prairie had a new appreciation for the significance of the standing issue. In its rehearing petition, Sun Prairie adopted the same modest and narrowly-circumscribed argument that appears in the Petition.

Sun Prairie's standing argument matured too late. This Court's decisions make it clear that a party seeking certiorari must have first given the court below a full

opportunity to draw out and analyze the issue, so that this Court's consideration can be informed by a record. *See United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to entertain an issue on which the courts below did not focus); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n. 7 (1996) (declining to entertain a newly refined argument on an issue that was decided below).[8] For this reason alone, issuance of the writ would be improvident.

3. The Decision Below is 100% Congruent With This Court's and All Other Precedents

The Court of Appeal's decision is in accord with all prior court decisions regarding the standing of aggrieved

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8. Sun Prairie argues in a footnote that the Court of Appeals should have rejected Citizens' prudential standing argument for failure to have raised it at the District Court level. *See* Petition at 8, n.7, *citing Pershing Park Villas Homeowners Assn. v. U.S. Pacific Ins. Co.*, 219 F.3d 895 (9th Cir. 2000). This is another argument that was presented to the Court of Appeals, for the first time, in its petition for rehearing *en banc*. The better weight of authority suggests that prudential standing arguments cannot be waived. *See, e.g., Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994); *Animal Legal Defense Fund, Inc. v. Espy*, 29 F.3d 720, 723 n.2 (D.C. Cir. 1994).

In any event, it would have been pointless to have challenged Sun Prairie's standing before the District Court, where it remained aligned with the Tribe, a clearly eligible litigant. *See National Wildlife Federation v. ASCS*, 955 F.2d 1199, 1208 (8th Cir. 1992) (in the 8th Circuit, where one plaintiff exhibits standing to sue, the standing of other plaintiffs should not be challenged). It was not until the Tribe realigned with Citizens and the government, during the appeal, that it was permissible to challenge Sun Prairie's standing.

non-Indian contractors, including (1) this Court's flagship ruling in *In re Sanborn*,[9] decisions by three courts of appeals,[10] and rulings by a number of district courts.[11] Moreover, the Interior Board of Indian Appeals, an agency entitled to deference in its interpretation of the Indian laws,[12] has consistently interpreted the laws requiring government approval of tribal contracts with non-Indians to preclude non-Indians from bringing legal action challenging governmental decisionmaking in this regard.[13]

In asking the Court to alter a century of case law, Sun Prairie draws strands from prudential standing decisions far outside the realm of Indian law. The cases relied upon,

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9. 148 U.S. 222, 227 (1893) (denying a cause of action to non-Indian contractor because the pertinent federal statutes were intended exclusively "to protect the Indians from improvident and unconscionable contracts.").

10. *See San Xavier Develop. Auth. v. Charles*, 237 F.3d 1149, 1152-53 (9th Cir. 2001); *Western Shoshone Business Council v. Babbitt*, 1 F.3d 1052 (10th Cir. 1993) (explicitly rejecting the precise "two-prong" standing argument offered here by Sun Prairie); *Schmit v. International Finance Management Co.*, 980 F.2d 498 (8th Cir. 1992) (*per curiam*).

11. *See, e.g., Utah v. U. S. Department of the Interior*, 45 F. Supp. 2d 1279, 1283 (D. Utah 1999), *aff'd on other grounds*, 210 F.3d 1193 (10th Cir. 2000).

12. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

13. *See, e.g., Utah v. Acting Phoenix Area Director, Bureau of Indian Affairs*, 32 IBIA 169 (1998); *Kombol v. Acting Assistant Portland Area Director*, 19 IBIA 123 (1990).

however, do not support the thesis. Granted, in some cases prudential standing has been recognized not just for parties who are the intended beneficiaries of a statutory provision, but also for those who are the "coincidental" beneficiaries thereof, *i.e.*, those whose interests align so well with the purposes of the statute in question that they are accorded the same status as the intended beneficiaries.[14/] But this rationale, and these cases, are clearly inapposite here. Sun Prairie has no interests that are protected by 25 U.S.C. § 415; indeed, as a company accused of predatory dealings with Indians, it is a quintessential target of the law. Judicial recognition of a non-Indian contractor's prudential standing would subvert the essential goals of this Indian-protective statutory regime.[15/] It would also usurp Congress' historic, primary role in policing and updating the law governing commerce between Indians and non-Indians.[16/]

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14. *See, e.g., National Credit Union Administration v. First National Bank & Trust Co.*, 522 U.S. 479 (1998) (competitors of regulated financial institutions have prudential standing to challenge agency action relaxing statutory restrictions on the activities of those institutions"); *Clarke v. Securities Industry Assn.*, 479 U.S. 388 (1987) (same).

15. *See Clarke, supra*, 479 U.S. at 397 n. 12 (prudential standing must be denied "those plaintiffs whose suits are more likely to frustrate than to further statutory objectives.").

16. In recent amendments to 25 U.S.C. § 81, Congress elected not to alter the rules regarding judicial review. Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. 106-179.

4. Even if This Court Were to Remand, The District Court's Decision Would be Reversed on the Merits

Even if this Court were to grant the writ and reverse the Eighth Circuit's standing decision, it is virtually certain that on remand the District Court's injunction would be overturned on the merits. In their briefs to the Eighth Circuit, the government, the Tribe and Citizens raised a great number of compelling reasons why the District Court's order was legally infirm. Specifically, they alleged that the order was defective because:

– the District Court issued a permanent injunction against government interference with the project, when the only permissible remedy was a remand to the agency;

– the District Court grounded its decision on the fact that neither BIA Director Gover nor his senior staff had personally read every page of the administrative record, *id.* at 34a;

– the District Court found the government -- the defendant in the case -- guilty of laches, *id.* at 39a-40a;

– although judicial review in this administrative law case is confined to the administrative record, the District Court conducted a two-day trial on the substantive environmental issues, *id.* at 21a-22b and n. 3.;

– the District Court enjoined Citizens from opposing the hog farm project, even though Citizens had not been named in any pleading or motion, *id.* at 57a.

Several of the appellants' argument are independently sufficient to justify reversal of the District Court's order. Therefore, it is highly unlikely that granting the writ will lead to a different outcome in the final analysis.

CONCLUSION

The facts in this case are *sui generis*, making it virtually inconceivable that a ruling by this court on the standing issue will have implications for anyone except the parties. Because the question presented in the Petition was not considered below and, indeed, has never been considered by any other court, Sun Prairie would put this Court in the difficult position of making new law on the basis of the most meager of judicial records. Even if this Court were to reverse the well-reasoned and legally-precedented decision of the Court of Appeals, the multiple infirmities of the District Court's decision all but assure that it will be vacated, and that Sun Prairie will not ultimately obtain the relief that it seeks in this case. For these reasons the writ should be denied.

Dated: January 15, 2003

Respectfully submitted,

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